

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT STRANG)	
Claimant)	
VS.)	
)	Docket Nos. 216,794; 225,211;
)	228,312 & 253,609
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY/AMERICAN)	
MANUFACTURERS MUTUAL INSURANCE)	
COMPANY and INSURANCE COMPANY)	
STATE OF PENNSYLVANIA)	
Insurance Carriers)	

ORDER

Respondent and its insurance carriers appealed the May 8, 2001 Award and the May 10, 2001 Nunc Pro Tunc Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on November 9, 2001, in Wichita, Kansas.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent and Aetna Casualty & Surety/American Manufacturers Mutual Insurance Company c/o Kemper Insurance Company. Eric K. Kuhn of Wichita, Kansas, appeared for respondent and Insurance Company State of Pennsylvania c/o American International Group.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award and Nunc Pro Tunc Award. The Award and Nunc Pro Tunc Award, however, list a September 12, 2000 deposition of Dr. C. Reiff Brown as part of the evidentiary record. But that is an error as the parties advised the Board at oral argument that the doctor did not testify. The parties also agreed at oral argument that the medical reports attached to

the agreed Awards entered in Docket #216,794 and Docket #225,211 are included in the evidentiary record.

ISSUES

The Judge consolidated the four docketed claims for trial and decision.

Docket #216,794 is a claim for a neck injury caused by repetitive mini-traumas with a stipulated date of accident of January 23, 1997. That claim was originally settled based upon a 7.5 percent permanent partial general disability by an agreed Award filed with the Division of Workers Compensation on April 10, 1997. Claimant filed for review and modification of the agreed Award on April 20, 1999.

Docket #225,211 is a claim for bilateral upper extremity injuries caused by repetitive mini-traumas with a stipulated date of accident of June 30, 1997. That claim was originally settled based upon an 11.5 percent permanent partial general disability by an agreed Award filed with the Division of Workers Compensation on August 13, 1998. Claimant filed for review and modification of the agreed Award on April 20, 1999.

Docket #228,312 is a claim for a low back injury caused by repetitive mini-traumas with a stipulated date of accident of November 1, 1997.

Docket #253,609 is a claim for neck injuries allegedly caused from looking at a computer screen through claimant's last day of work with respondent on December 2, 1998, when he was terminated.

In the May 8, 2001 Award and the May 10, 2001 Nunc Pro Tunc Award, Judge Barnes found that claimant was permanently and totally disabled and awarded him permanent total disability benefits. The Judge assessed 25 percent of the award to the parties in the first claim, respondent and Kemper Insurance Company (Kemper), and assessed 75 percent to the parties in the last three claims, respondent and American International Group (AIG).

Respondent and Kemper contend Judge Barnes erred. They argue that claimant failed to prove that his award in Docket #216,794 should be modified. First, respondent and Kemper argue that claimant failed to prove that any additional impairment in his neck was the natural and probable consequence of the initial neck injury. They argue that any increase in impairment in claimant's neck is due to his work activities as alleged in the fourth claim, Docket #253,609. Second, respondent and Kemper argue that claimant's termination does not justify modifying the original agreed Award as claimant was terminated from his accommodated job for misconduct and, therefore, could have continued to work and continued to earn a comparable wage but for his inappropriate behavior.

Accordingly, respondent and Kemper request the Board to deny claimant's request for review and modification and determine that any increase in impairment in claimant's neck is the responsibility of respondent and AIG.

Respondent and AIG also contend Judge Barnes erred. First, they likewise argue that claimant was terminated for misconduct and, therefore, any award should be limited to the functional impairment rating. They argue that claimant could have continued to work for respondent and continued to earn a comparable wage if he had not been terminated for inappropriate conduct. But respondent and AIG contend that any increase in functional impairment for the neck is the responsibility of respondent and Kemper in Docket #216,794 as the greater weight of the medical evidence indicates that the neck injury alleged in the fourth claim (Docket #253,609) for repetitive work activities through the last day of work on December 2, 1998, was merely temporary in nature.

Accordingly, respondent and AIG request the Board to (1) deny claimant's request for review and modification in Docket #225,211 regarding the bilateral upper extremities, (2) limit claimant's award to the functional impairment in Docket #228,312 regarding the low back, and (3) deny the request for permanent disability benefits in Docket #253,609 as claimant only temporarily aggravated his neck while working through December 2, 1998.

Conversely, claimant requests the Board to affirm the Award and the Nunc Pro Tunc Award. Claimant argues that he is permanently and totally disabled as the combined result of his low back, neck and upper extremity injuries. Claimant contends that his symptoms were worsening when he was terminated and that he would not have been able to continue working his accommodated job for very much longer even if he had not been terminated. Finally, claimant argues that he was not fired for misconduct but, instead, he was fired because of his physical impairment.

The only issues before the Board on this appeal are:

1. Should the agreed Award entered in Docket #216,794 for claimant's original neck injury be modified due to a change in claimant's functional impairment or due to his termination from employment?
2. Should the agreed Award in Docket #225,211 for claimant's bilateral upper extremity injuries be modified due to claimant's termination from employment?
3. In Docket #228,312, what is the nature and extent of injury and disability relating to claimant's low back?
4. In Docket #253,609, did claimant sustain additional injury or aggravation to his neck through his last day of work on December 2, 1998? If so, what is the nature and extent of the injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

Docket #216,794 and Docket #253,609 (both involving the neck)

1. By agreed Award filed with the Division of Workers Compensation on April 10, 1997, the parties agreed in Docket #216,794 that claimant had a 7.5 percent permanent partial general disability for injuries sustained to claimant's neck from January 1989 through January 23, 1997. In the present proceeding, the parties stipulated that the appropriate date of accident for that accidental injury was January 23, 1997.
2. The parties attached to the agreed Award two medical reports. In a January 7, 1997 letter, Dr. Jacob Amrani indicated that claimant had a 7 percent whole body functional impairment due to his cervical spine. In a February 10, 1997 letter, Dr. Lawrence R. Blaty rated claimant's whole body functional impairment at 8 percent based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides).
3. Dr. C. Reiff Brown evaluated claimant in May 2000 at Judge Barnes' request. Dr. Brown, who is board-certified as both an orthopedic surgeon and in performing disability evaluations, determined that claimant's degenerative cervical disc disease and radicular symptoms placed him in the DRE cervicothoracic category III and, therefore, claimant had a 15 percent whole body functional impairment. The doctor also believed that claimant's neck condition restricted him from doing work that required frequent neck movements and lifting above shoulder level.
4. Dr. Brown also indicated in his May 9, 2000 report that the neck injury that allegedly occurred from January 1998 through December 2, 1998 (the aggravation which is alleged in Docket #253,609), did not permanently aggravate claimant's preexisting neck condition and created no additional functional impairment.
5. Dr. Pedro Murati also addressed claimant's neck condition. Dr. Murati, who is board-certified in physical medicine and rehabilitation and also board-certified as an independent medical examiner, saw claimant at his attorney's request in January 2000 for a neck evaluation. At that evaluation, the doctor determined that claimant fell in the fourth edition of the AMA Guides DRE cervicothoracic category IV for a 25 percent whole body functional impairment. The doctor did not recommend any restrictions that claimant should observe due to his neck as the doctor believed claimant was essentially and realistically unemployable.
6. Claimant did not provide Dr. Murati with a history that he had injured his neck from January 1998 through his last day of work on December 2, 1998. Accordingly, the doctor

agreed that he was not able to determine whether claimant sustained additional impairment to his neck from performing his accommodated job, which required claimant to look at a computer screen a portion of the time. Dr. Murati testified, in part:¹

Q. (Mr. Kuhn) Mr. Strang did not give you a history of any injury to his neck from January of '98 through December 2nd of '98, did he?

A. (Dr. Murati) I don't think so.

Q. And he did not give you any history of an injury to his neck while having to look at a computer screen at an awkward angle, did he?

A. I don't think so.

Q. So isn't it fair to say that you can't speak to any issues of permanent impairment or restrictions pertaining to this gentleman's neck condition arising out of the factual situation or hypothetical factual situation I just gave you about an injury to his neck while looking at a computer screen? Is that correct?

A. That is correct.

Q. So your opinion with respect to this gentleman's permanent impairment pertaining to his neck is solely related to the injury described to you from January of '89 through January 23rd of 1997, is that correct?

A. Yes.

7. The Board finds that the greater weight of the medical evidence establishes that claimant's functional impairment due to his cervical spine has increased to 20 percent, which is the average of Dr. Brown's 15 percent rating and Dr. Murati's 25 percent rating. The Board also finds that claimant's additional impairment to the cervical spine is the natural and probable result of the initial neck injury that claimant sustained from January 1989 through January 23, 1997. Therefore, the agreed Award in Docket #216,794 should be modified to award claimant a 20 percent permanent partial general disability.

8. Conversely, claimant is not entitled to permanent disability benefits in Docket #253,609 as any aggravation to claimant's neck from performing his accommodated job was only temporary in nature and caused neither additional permanent injury nor permanent functional impairment.

¹ Deposition of Dr. Pedro Murati, June 19, 2000; pp. 34, 35.

9. The Board rejects claimant's argument that he is entitled to a work disability (a disability greater than the functional impairment rating).

Claimant's right to permanent partial general disability benefits is governed by K.S.A. 1996 Supp. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*² and *Copeland*.³ In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against a work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that injured workers' post-injury wages should be based upon an ability to earn rather than actual wages when the workers fail to make a good faith effort to find appropriate employment after recovering from their injury.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁴

² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁴ *Copeland*, p. 320.

10. The Board concludes that claimant failed to make a good faith effort to retain his employment with respondent. According to claimant, in approximately November 1997 respondent assigned him an easier job of a material processor, which accommodated his work restrictions. The new position permitted claimant to sit, required no lifting greater than 10 pounds, and allowed claimant to get up and move around as tolerated. Claimant performed that job until he was terminated for misconduct on December 2, 1998, after receiving approximately six corrective action memorandums for various infractions.

11. The Board rejects claimant's argument that he was terminated because of his various injuries and resulting disabilities. The Board concludes that the testimony of claimant's former supervisor, David Warren, is credible and that claimant's testimony is not. The Board finds and concludes that respondent acted in good faith and terminated claimant due to his misconduct, which consisted of violating parking rules; missing work for several days; refusing to use the bicycles provided to him and, instead, insisting that he be given a new bicycle; and on two occasions leaving work during mid-shift without either advising or obtaining permission from a supervisor.

12. The Board concludes that claimant's misconduct is tantamount to refusing to work an accommodated job and, therefore, claimant's post-injury wage should be imputed. The Board also concludes that claimant could have continued to work for respondent and earn a comparable wage if he had not displayed the inappropriate conduct. Therefore, the comparable wage that claimant was earning in his accommodated job is the imputed post-injury wage. Because the imputed post-injury wage is at least 90 percent or more of the pre-injury average weekly wage, claimant's permanent partial general disability is limited to the functional impairment rating.

13. The Board rejects claimant's contention that his condition has worsened, leaving him permanently and totally disabled. The Board is persuaded by the restrictions set forth by Dr. Brown and concludes that claimant retains the ability to perform substantial and gainful employment. The restrictions for claimant's neck are set forth above. Dr. Brown, however, in his May 2000 report also noted the restrictions for claimant's bilateral upper extremity and low back injuries. To protect the upper extremities, Dr. Brown believed claimant should avoid frequent manipulative activity with the hands requiring flexion and extension more than 30 degrees and avoid using power tools. To protect the low back, the doctor believed claimant should avoid lifting greater than 40 pounds occasionally, avoid lifting greater than 20 pounds frequently, lift only by utilizing proper body mechanics, and avoid frequent bending.

14. Although claimant's restrictions, as set forth by Dr. Brown, limit the type of employment that he may pursue, the Board finds that claimant is neither essentially nor realistically unemployable.

15. In summary, the Board increases claimant's permanent partial general disability to 20 percent in Docket #216,794 and denies the request for permanent disability benefits in Docket #253,609. Pursuant to the Workers Compensation Act, the effective date for the modification of the agreed Award is six months before the application for review and modification was filed, which in this case is October 20, 1998.⁵

Docket #225,211 (bilateral upper extremities)

16. The Board adopts the findings and conclusions set forth above.

17. By agreed Award filed with the Division of Workers Compensation on August 13, 1998, the parties agreed that claimant had an 11.5 percent permanent partial general disability for bilateral upper extremity injuries sustained by claimant from 1992 and each day thereafter. In the present proceeding, the parties stipulated that the appropriate date of accident for that series of alleged accidents was June 30, 1997.

18. The parties attached to the agreed Award letters and documents from Dr. Bernard Hearon, Dr. Murati, and Dr. Philip R. Mills. In a document signed on December 3, 1997, Dr. Hearon indicated that claimant had no permanent impairment as a result of the bilateral carpal tunnel syndrome the doctor had treated with surgery.

In a January 15, 1998 medical report, Dr. Murati diagnosed both bilateral carpal tunnel syndrome previously operated and bilateral ulnar cubital syndrome, which resulted in claimant having a 21 percent whole body functional impairment for those conditions according to the fourth edition of the *AMA Guides*.

On the other hand, Dr. Mills wrote in his April 20, 1998 report that he believed claimant had a 12 percent whole body functional impairment for the operated bilateral carpal tunnel syndrome according to the fourth edition of the *AMA Guides*.

19. According to Dr. Brown, as of May 2000 claimant's functional impairment was less than that determined previously by Dr. Murati in January 1998 and Dr. Mills in April 1998. In his May 9, 2000 letter to Judge Barnes, Dr. Brown rated claimant's functional impairment at 3 percent to the body for each upper extremity, which when combined according to the *AMA Guides* is less than the earlier ratings. The Board notes that claimant deposed Dr. Murati for purposes of the present proceeding and that the doctor did not testify that claimant's functional impairment for the bilateral upper extremities had changed from that originally expressed in the January 15, 1998 report.

⁵ See K.S.A. 44-528 (Furse 1993).

20. The Board finds and concludes that claimant has failed to prove that he has sustained any additional impairment or injury to his upper extremities. Therefore, the agreed Award should not be modified due to a change in claimant's impairment. For the reasons expressed above in Docket #216,794 and Docket #253,609, the agreed Award should not be modified due to claimant's termination from employment.

Docket #228,312 (low back)

21. The Board adopts the findings and conclusions set forth above.

22. This is a claim for a low back injury that allegedly occurred from repetitive traumas beginning in January 1992. The parties stipulated the appropriate date of accident for this claim is November 1, 1997, which the Board notes is the approximate date that claimant moved into the accommodated job as a material processor.

23. Only two medical opinions were introduced addressing claimant's low back impairment. Dr. Brown commented in his May 2000 report that claimant had degenerative disc disease at several levels, which fell within the parameters of the DRE lumbosacral category II and constituted a 5 percent whole body functional impairment.

On the other hand, Dr. Murati, who examined claimant in June 1999 for his low back problems, diagnosed lumbosacral strain with right-sided radiculopathy and indicated that claimant's condition fell within DRE lumbosacral category III, creating a 10 percent whole body functional impairment.

24. The Board finds both opinions credible and concludes that claimant's functional impairment lies somewhere between Dr. Brown's 5 percent rating and Dr. Murati's 10 percent rating and, therefore, finds that claimant has a 7.5 percent whole body functional impairment due to his low back.

25. For the reasons set forth in the above claims, the Board concludes that claimant's permanent partial general disability for the low back is limited to the 7.5 percent functional impairment rating.

AWARD

WHEREFORE, the Board modifies the May 8, 2001 Award and May 10, 2001 Nunc Pro Tunc Award as claimant is entitled to receive a 20 percent permanent partial general disability in Docket #216,794 for the neck injuries that he sustained through January 23, 1997; the request to modify the agreed Award in Docket #225,211 for bilateral upper extremity injuries sustained through June 30, 1997, is denied; claimant is entitled to receive a 7.5 percent permanent partial general disability in Docket #228,312 for permanent low

back injuries sustained through November 1, 1997; and claimant is denied permanent disability benefits in Docket #253,609 for alleged aggravations to the neck through December 2, 1998.

Docket #216,794

Robert Strang is granted compensation from The Boeing Company and Aetna Casualty & Surety/American Manufacturers Mutual Insurance Company c/o Kemper Insurance Company for a January 23, 1997 accident and resulting disability. Based upon an average weekly wage of \$864.76, 1.14 weeks of temporary total disability benefits are due at \$338 per week, or \$385.32.

For the period from January 23, 1997, through October 19, 1998, 31.13 weeks of permanent partial disability benefits are due at \$338 per week, or \$10,521.94, for a 7.5 percent permanent partial general disability.

For the period commencing October 20, 1998, 51.87 weeks of permanent partial disability benefits are due at \$338 per week, or \$17,532.06, for a 20 percent permanent partial general disability. The total award is \$28,439.32, which is all due and owing less any amounts previously paid.

Docket #228,312

Robert Strang is granted compensation from The Boeing Company and Insurance Company State of Pennsylvania c/o American International Group for a November 1, 1997 accident and resulting disability. Based upon an average weekly wage of \$914.55, Mr. Strang is entitled to receive 31.13 weeks of permanent partial disability benefits at \$351 per week, or \$10,926.63, for a 7.5 percent permanent partial general disability and a total award of \$10,926.63, which is all due and owing less any amounts previously paid.

The Board adopts the remainder of the orders set forth in the May 8, 2001 Award and May 10, 2001 Nunc Pro Tunc Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent and Kemper Insurance Company
Eric K. Kuhn, Attorney for Respondent and American International Group
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director